

ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-04

DATE ISSUED: March 3, 1998

ISSUED TO: Norbert Sickler, Administrator, Southwest
Multi-County Correction Center

Franklin "Tex" Appledorn, Chairman, Southwest
Multi-County Correction Center Board of Directors

CITIZENS' REQUESTS FOR OPINIONS

On December 11, 1997, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Marguerite Schatz asking whether the Southwest Multi-County Correction Center (SWMCCC) violated N.D.C.C. § 44-04-20 by holding meetings that were not preceded by sufficient notice. On December 29, 1997, this office received a related request from Kerry Schorsch alleging the same violations of N.D.C.C. § 44-04-20 and further alleging that the SWMCCC violated N.D.C.C. § 44-04-18 by failing to provide copies of open public records within a reasonable time, by refusing to deny access in writing, and by charging an unreasonable fee for copies of open public records. On January 5, 1998, this office received a third request concerning the SWMCCC, from Randal Schwartz, alleging similar violations of N.D.C.C. § 44-04-18 concerning access to SWMCCC records and the fee for copies of those records. On January 26, 1998, this office received another request from Kerry Schorsch alleging further violations by the SWMCCC of N.D.C.C. § 44-04-18 regarding access to open public records and the fee charged for copies.

FACTS PRESENTED

The SWMCCC provided my office a copy of an agreement between several counties in southwest North Dakota for the joint ownership and operation of a regional correction center. The SWMCCC Board of Directors consists of one commissioner from each member county and two ex-officio members appointed by the other Board members. Currently, the SWMCCC is considering expansion into the New England area, which has generated significant public interest in the issue.

The SWMCCC Board holds its regular meetings on the second Monday of each month. However, the SWMCCC Board rescheduled its November 10, 1997, regular meeting to November 14, 1997. Notice of the change was

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given to the media and certain opponents of the expansion, but no further notice was posted or given. During a break in the November 14 meeting, SWMCCC Administrator Norbert Sickler, who is not a member of the SWMCCC Board, met with another person who was not a member of the Board, while a SWMCCC Board member was attending to personal business.

The Board also met on December 4, 1997, to discuss a purchase agreement regarding the expansion. According to Mr. Sickler, this was a special meeting and the regular monthly meeting was held as scheduled on December 8, 1997. Mr. Sickler indicated that notice of the December 4 meeting was given to the media and certain opponents of the expansion when the Board members were notified on December 3, but no further notice of the special meeting was given. The action taken at the December 4 meeting was reconsidered and ratified by the Board at its regular meeting on December 8, 1997, after full discussion on the issue. Mr. Sickler acknowledges that no notice of either the November 14 or the December 4 meeting was filed with the county auditors' offices or posted at the SWMCCC.

On December 2, 1997, Mr. Schwartz submitted a written request for several SWMCCC records. Copies of one record were provided at \$2.00 per page. Copies of the other records were not provided to Mr. Schwartz, but were provided to Mr. Schorsch. Mr. Sickler has explained his belief that since Mr. Schwartz and Mr. Schorsch were at the SWMCCC together requesting the same records, only one copy was desired.

On December 9, 1997, Mr. Schorsch requested copies of any correspondence or documents concerning the SWMCCC's application for funds from the Hettinger County Job Development Authority (JDA) to expand into New England. Mr. Sickler indicated that he had signed something for Glenn Giese, Director of the Hettinger County JDA, but he did not keep a copy of those documents.

On December 11, 1997, Mr. Schorsch asked for copies of minutes for all SWMCCC meetings in November and December 1997. Mr. Schorsch received a copy of the minutes of the November 10 meeting for \$2.00 per page (a total of \$8.00), but was told minutes had not yet been prepared from notes of the December meetings. Mr. Schorsch requested and was denied copies of the notes taken of the meeting.

On December 19, 1997, Mr. Schorsch submitted written requests to Mr. Sickler for the December meeting notes first requested on December 9 and for several other documents regarding the Hettinger County JDA and the proposed expansion into New England, including any

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official or unofficial minutes of any meetings of the SWMCCC Board in December 1997. Each request also asked that any denial of copies of the requested records be in writing and explain the legal authority for the denial as required in N.D.C.C. § 44-04-18(6), but Mr. Sickler did not deny the requests in writing. In a telephone call with my office, Mr. Sickler indicated he did not deny copies of the requested records, but was waiting for a telephone call from the requester to find out when the records could be picked up.

On January 22, 1998, Mr. Schorsch made a verbal request for minutes of all SWMCCC Board meetings since June 1997. Eighteen pages of minutes were provided at \$1.00 per page. Copies of minutes of the SWMCCC Board's August 1997 meeting were not provided, and Mr. Sickler refused to make a denial in writing upon request. Apparently, the notes of the meeting were lost and had to be reconstructed and approved by the SWMCCC Board at its next meeting. Mr. Schorsch also submitted a written request for all minutes and notes of SWMCCC Board meetings since January 1, 1998. The notes of the regular January meeting were not provided, and a denial was not made in writing upon request. Mr. Sickler explained to Mr. Schorsch he did not have time at the moment to prepare a written denial due to other job responsibilities. Mr. Sickler also told Mr. Schorsch he was not denying the request, or refusing to make a denial in writing, but simply needed time to respond.

ISSUES

1. Whether the SWMCCC is a public entity subject to the open records and meetings laws.
2. Whether sufficient public notice was given of the SWMCCC Board meetings on November 14 and December 4, 1997.
3. Whether the meeting between Administrator Norbert Sickler and a person who was not a member of the SWMCCC Board was a meeting required to be preceded by public notice.
4. Whether it was an unreasonable delay for the records requested by Randal Schwartz on December 2, 1997, to be provided over a month later.
5. Whether a charge of \$2.00 and \$1.00 per page for copies of SWMCCC records was reasonable.

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6. Whether the SWMCCC was required to provide copies of requested documents signed by Mr. Sickler and submitted to the Hettinger County JDA.
7. Whether official notes of meetings of a governing body that have yet to be organized into minutes may be withheld from public disclosure until draft minutes are prepared.
8. Whether the failure to copy requested records until the requester came back or called to ask when he could pick up the copies was a failure to provide copies in a reasonable time.
9. Whether the failure to provide copies of records immediately is a denial of access or copies, required to be in writing upon request.

ANALYSES

Issue One:

All records and meetings of a public entity are open and accessible to the public unless otherwise specifically provided by law. N.D.C.C. §§ 44-04-18, 44-04-19; N.D. Const. art. XI, secs. 5, 6. The definition of "public entity" includes public or governmental "agencies" of a county. N.D.C.C. § 44-04-17.1(10), (12)(b). "[A]gency" denotes a relation created by law or contract whereby one party delegates the transaction of some lawful business to another." Grand Forks Herald v. Lyons, 101 N.W.2d 543, 546 (N.D. 1960); Forum Publishing Co. v. Fargo, 391 N.W.2d 169, 172 (N.D. 1986). See also Letter from Attorney General Nicholas Spaeth to Ken Solberg (August 2, 1991) (NDIRF subject to open records law as an "agency" of various political subdivisions). The SWMCCC is a joint enterprise created by an agreement of several counties whereby the member counties delegate their lawful business of providing correction facilities and services to the SWMCCC Board. Therefore, it is my opinion that the SWMCCC is a "public entity" subject to the open records and meetings laws. Mr. Sickler indicates that the SWMCCC has always assumed it is subject to these laws.

Issue Two:

All meetings of the SWMCCC Board, as the governing body of a public entity, must be preceded by public notice as required in N.D.C.C. § 44-04-20. For all meetings of a county-level public entity, notice must be:

1. Posted in the governing body's principal office, if any;
2. Posted at the meeting location (on the day of the meeting); and
3. Filed with the county auditor or designee of the county, unless all the notice information was previously included in the governing body's annual schedule.

N.D.C.C. § 44-04-20(4). For special or emergency meetings, there are two additional requirements:

4. Notice must be provided to the public entity's official newspaper, if any; and
5. Notice must be provided to any representatives of the news media who have requested it.

N.D.C.C. § 44-04-20(6).

N.D.C.C. § 44-04-20 does not indicate which county auditor's office should receive meeting notices and annual schedules for multi-county entities. The apparent purpose of requiring the notice to be filed with the county auditor is to have a central location for people to find out about all public meetings affecting the county. The residents of one county represented by the SWMCCC are entitled to the same notice of public meetings as the residents of any other participating county. N.D.C.C. § 44-04-20 does not excuse multi-county entities from the central filing requirement. Therefore, it is my opinion that the SWMCCC must file its annual schedule and meeting notices in the county auditor's office of each participating county.

Mr. Sickler's response to the opinion request indicates that the local media and certain interested citizens were notified of both the November 14 and December 4 meetings, but that a notice was not prepared, centrally filed, or posted at the meeting location for either meeting. As a result, it is my opinion that sufficient notice was not provided for either meeting.

Issue Three:

During a break in the November 14 meeting, Mr. Sickler met with another person attending the meeting who was not a member of the SWMCCC Board. A SWMCCC director also left the meeting, but was

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attending to personal business and did not participate in the discussion between Mr. Sickler and the other person. To be a "meeting" under N.D.C.C. § 44-04-19, the meeting must involve a "quorum" of a "governing body." N.D.C.C. § 44-04-17.1(6), (8), (14). Since the discussion between Mr. Sickler and the other person did not involve any of the members of the SWMCCC Board of Directors, it is my opinion that the discussion was not a separate "meeting" subject to N.D.C.C. § 44-04-19 and public notice, therefore, was not required.

Issue Four:

A request for records need not be made in person and may not be subject to unreasonable delay. N.D.C.C. § 44-04-18. Therefore, a request for access or copies must be granted or denied within a reasonable time. Whether records have been provided within a reasonable time will depend on the facts of a given situation. In this case, Mr. Schwartz requested several records on December 2, but had not yet received them a month later. Mr. Sickler believed that, since Mr. Schwartz and Mr. Schorsch were at the SWMCCC together requesting the same records, only one copy was desired. Each person has the right to a copy of open public records. Therefore, it is my opinion that Mr. Schwartz was entitled to his own copy of the requested records, and the failure to provide those records after a month's time was an unreasonable delay. Providing copies to several people should not be unduly burdensome since a public entity is entitled to charge for its actual cost of making a copy. N.D.C.C. § 44-04-18(2).

Issue Five:

The open records law allows public entities to charge a "reasonable fee" for copies of open records, which is defined as the entity's actual cost of providing the copy. N.D.C.C. § 44-04-18. The definition of "reasonable fee" also prohibits public entities from passing on to the requester the expense of locating records, providing access to public records, and excising exempt or confidential information. Id.

Mr. Sickler originally charged \$2.00 per page for copies of SWMCCC records. Sometime after being contacted by my office in response to Mr. Schorsch's first request, the fee was reduced to \$1.00 per page. A public entity's actual cost of making a copy will generally be limited to the cost of labor to make the copy (but not the labor involved in providing access to the record) and the cost attributable to the equipment and materials necessary to make the copy. See N.D.C.C. § 44-04-18. Although whether a fee is reasonable will also

depend on the facts of a given situation, the information provided by Mr. Sickler regarding the SWMCCC's expenses for making the copies does not justify a fee of either \$2.00 or \$1.00 per page. It is my opinion that both charges exceed the SWMCCC's actual cost of making copies and are therefore unreasonable.

Issue Six:

The open records law is limited to records "of" a public entity, and a public entity is not required to provide access to or copies of a requested record that does not exist or has not been kept. N.D.C.C. § 44-04-18(3). Mr. Sickler has indicated that although he signed some forms for the Hettinger County JDA concerning the SWMCCC's application for funds to expand into New England, he did not keep a copy of those forms. Therefore, because there were no SWMCCC records to disclose, it was not a violation of N.D.C.C. § 44-04-18 for Mr. Sickler to deny the request. Mr. Sickler later obtained copies from the JDA of two of the forms he signed and provided them to Mr. Schorsch.

Issue Seven:

"Working papers" are specifically included in the definition of "record." N.D.C.C. § 44-04-17.1(15). Disclosure of working papers and preliminary drafts can be delayed until work is discontinued on the draft or the draft is provided to a member of the governing body, N.D.C.C. § 44-04-18(8), but disclosure of draft minutes may not be conditioned on the approval of the minutes by the governing body. N.D.C.C. § 44-04-21(2).

The procedure for the SWMCCC was for someone to take the official notes of all meetings, and for minutes to be prepared based on those notes for approval by the Board. It is clear that the official meeting notes and the draft minutes prepared from the notes must be available for public disclosure once the draft minutes are completed, even before those minutes are formally accepted by the SWMCCC Board. It is also clear that other notes of the meeting, which are not being used to prepare minutes, do not qualify as working papers and are SWMCCC records available upon request, if retained by the Board members.

The phrases "working papers" and "preliminary drafts" are not defined in N.D.C.C. ch. 44-04 and must be given their plain and ordinary meaning. N.D.C.C. § 1-02-03. As commonly understood, the phrases are generally interchangeable: records that are created and used by a drafter in the process of creating another record. See American

Heritage Dictionary 1391 (2d coll. ed. 1991) ("working" means "used as a basis for further work"). Once a draft is no longer being worked on or is distributed to a member of a governing body, the draft and all of the working papers or preliminary drafts leading up to the draft must be disclosed upon request. Thus, it is my opinion that the requested notes of the August and December 1997 meetings and the January 1998 meeting may be withheld until draft minutes are prepared. Because minutes must be kept of all open meetings, N.D.C.C. § 44-04-21(2), draft minutes must usually be prepared and available before the next regular meeting of the public entity. However, the official notes from the August 1997 meeting apparently were lost and are now in the process of being recreated.¹

Issue Eight:

As described in Issue Four, a request must be granted within a reasonable time. N.D.C.C. § 44-04-18. If a public entity does not provide copies immediately, the entity is still required to provide the copies within a reasonable time and cannot disregard the request until the requester asks for the records again. Here, records were requested on December 19, 1997, but were not picked up by the requester until about four weeks later. Mr. Sickler explained in a telephone call with a staff member of this office that he was waiting for Mr. Schorsch to call back to arrange a time to pick up the records. However, once a person makes a request for records, the person is entitled to receive the records within a reasonable time. The burden was on the SWMCCC to let Mr. Schorsch know when copies of the requested records were available. It is my opinion that the four-week delay in providing the copies was unreasonable.

Issue Nine:

By prohibiting an unreasonable delay in providing access or copies, the Legislature has indicated by implication that access to or copies of open public records need not always be provided immediately. Depending on the public entity's work load and other responsibilities, a delay may be reasonable. It does not necessarily constitute a "denial" of access or copies, required to be in writing upon request under N.D.C.C. § 44-04-18(6), if the public entity delays providing access or copies.² If provision of copies or access

¹ No violation of N.D.C.C. § 44-04-21(2) has been alleged, which requires that minutes be kept of all meetings.

² This opinion should not be construed as approval of a built-in response time for providing access to and copies of open public records. An effort should be made to provide access or copies

is delayed, the public entity should give the requester some idea of when the requested access or copies will be provided.

In this case, written denials of copies were requested, but not provided, on December 19, 1997, and January 22, 1998.³ Mr. Sickler has indicated to a staff member of this office that he was not denying either request, but needed some time to gather the requested records and to prepare draft minutes based on the official notes of the meetings. Based on the facts provided to this office, it is my opinion that copies of the records requested on December 19, 1997, and January 22, 1998, were delayed rather than denied,⁴ and therefore a written denial was not required for either request. It is important that a public entity indicate to the requester whether the request is being denied or simply delayed a reasonable length of time.

CONCLUSIONS

1. It is my opinion that the Southwest Multi-County Correction Center is a "public entity" subject to the open records and meetings laws.
2. It is my further opinion that sufficient notice was not given for the SWMCCC Board meetings on November 14 and December 4, 1997.

immediately. Depending on the circumstances, a delay may be appropriate for a number of reasons, including excising closed or confidential information, consulting with an attorney when there is a reasonable doubt whether the records are open to the public, or balancing other responsibilities of the public entity that demand immediate attention. However, although an open records request need not always be given the highest priority among a public entity's responsibilities, it is clear that complying with an open records request is an important responsibility and a public entity cannot delay a response unreasonably or indefinitely. Reasonable delays will usually be measured in hours or a few days rather than several days or weeks.

³ A written denial was not requested on December 2, December 9, or December 11.

⁴ As discussed in Issues Seven and Eight, it was reasonable to delay access to those notes but the delay in providing copies of the other records was unreasonable.

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3. It is my further opinion that the conversation between SWMCCC Administrator Norbert Sickler and another person who was not a member of the SWMCCC Board, on November 14, 1997, was not a "meeting" under the open meetings law.
4. It is my further opinion that Randal Schwartz's request for copies of open records on December 2, 1997, was unreasonably delayed.
5. It is my further opinion that fees of \$2.00 and \$1.00 per page for copies of open records exceeded the SWMCCC's actual cost of making the copies and were unreasonable.
6. It is my further opinion that the SWMCCC was not required to provide copies of documents that were signed by Norbert Sickler and submitted to the Hettinger County JDA because the SWMCCC did not keep a copy of those documents.
7. It is my further opinion that it was not unreasonable to delay providing copies of the official notes of SWMCCC Board meetings until draft minutes were prepared based on the notes, as long as work was continuing on the draft minutes during the delay, and the notes were made available by the next SWMCCC Board meeting at the latest.
8. It is my further opinion that provision of copies of open records in response to Kerry Schorsch's December 19, 1997, request was unreasonably delayed.
9. It is my further opinion that a written denial was not required for the requests for copies submitted by Kerry Schorsch on December 19, 1997, and January 22, 1998, because the provision of the copies was delayed rather than denied.

STEPS NEEDED TO REMEDY VIOLATIONS

Actions and deliberations taken at the November 14 and December 4, 1997, SWMCCC Board meetings are void and must be reconsidered and ratified at a meeting preceded by sufficient public notice. Mr. Sickler's response indicates the Board reconsidered and ratified the Board's earlier approval of the purchase agreement after a full discussion of the issue by the Board at the December 8, 1997, meeting. If sufficient public notice was not given of the December 8, 1997, meeting, the actions must be reconsidered and ratified again at a properly-noticed meeting.

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The unreasonable delays have been remedied to the greatest extent possible by providing the requested copies of records to Mr. Schwartz and Mr. Schorsch, except for the official meeting notes. Draft minutes should already be prepared for the December 1997 meeting and the official notes and the draft minutes should be provided to Mr. Schorsch immediately if they have not already been provided. The notes of the August 1997 and January 1998 meetings should be provided as soon as draft minutes are prepared, but no later than the next SWMCCC Board meeting.

Mr. Sickler has indicated to this office that all fees charged in excess of \$0.25 per page will be refunded.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: James C. Fleming
Assistant Attorney General